United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7551

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Docket No. 76-7551

PHILO SMITH & Co., INC. and JAMES E. RUTHERFORD,
Plaintiffs-Appellants,

against

USLIFE CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

Plaintiffs-appellants, Philo Smith & Co., Inc. ("PS&Co.") and James E. Rutherford ("Rutherford"), submit this reply brief in response to the brief of defendant-appellee USLIFE Corporation ("USLIFE").

ARGUMENT

In this action, PS&Co. and Rutherford seek to recover a finder's fee for services rendered to USLIFE in connection with its acquisition of All American Life & Financial Corporation ("All American"). Plaintiffs' claim is based on

two written fee agreements and the oral promises of Gordon E. Crosby, Jr. ("Crosby"), USLIFE's Chairman and Chief Executive Officer, to extend those agreements. In a memorandum opinion reported at 420 F. Supp. 1266, the District Court (Tenney, D. J.) granted USLIFE's motion for a directed verdict, made at the close of plaintiffs' evidence, and dismissed the complaint. As shown in the Main Brief of Plaintiffs-Appellants ("Main Br."), the District Court committed three basic errors when it withdrew plaintiffs' case from the jury's consideration. First, the Court wrongly required plaintiffs to prove both the elements of estoppel and the elements of common law fraud; plaintiffs were required to prove only estoppel. [Main Br. at 6-15.] Second, even assuming that proof of fraud were required, plaintiffs established the requisite intent to defraud; but the District Court either ignored this evidence or misconstrued it. [Main Br. at 15-22.] Finally, the District Court violated the principles governing motions for a directed verdict by failing to treat the plaintiffs' evidence of estoppel in the light most favorable to them. [Main Br. at 22-31.]

In its brief, USLIFE raises a new issue. Defendant claims that "[e]stoppel is no longer available in New York to circumvent the Statute of Frauds." [Brief of Defendant-Appellee USLIFE Corporation ("USLIFE Br.") at 13.] As shown in Point I of this Argument, with this new claim defendant asks this Court to overrule long-standing New York precedent without providing any basis for such an extraordinary ruling. Point II shows briefly that defendant's attempt to support the decision below merely repeats the errors committed by the District Court.

POINT I

A Party May be Estopped from Asserting The Statute Of Frauds

In its brief, defendant broadly asserts that "no New York case has allowed a plaintiff recovery based on estoppel in reliance on an oral agreement within the Statute of Frauds" since the 1969 decision of the New York Court of Appeals in *Intercontinental Planning Ltd.* v. *Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969). [USLIFE Br. at 17.] As the defendant concedes, however, the *Intercontinental* case had nothing whatever to do with the issue of estoppel. [USLIFE Br. at 16.] Instead, defendant asks this Court to infer that "rejection of 'estoppel' is inherent in the decision", to overrule long-established New York law and to ignore subsequent decisions contrary to defendant's position.

In the *Intercontinental* case, the finder argued that a written agreement covering one transaction entitled him to a fee for services allegedly rendered in an entirely different transaction. The Court of Appeals rejected this claim and held that a finder could not recover in *quantum meruit* for the reasonable value of his services where there was a complete absence of any writing referring to the transaction actually consummated. Based on this limited holding, the defendant argues that the New York Statute of Frauds governing finders' fees prohibits not only recovery in *quantum meruit*, but also rules out any "kind of quasi-contractual theory of recovery." [USLIFE Br. at 18.]

This argument totally ignores the decision of the New York Court of Appeals in *Morris Cohon & Co.* v. *Russell*, 23 N.Y.2d 569, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969). In that case, the Court held that a finder could recover in *quantum meruit* where there was a writing which (1) identified the buyer; (2) identified the seller; (3) established

the fact of the finder's employment; and (4) established the subject matter of the transaction. In reaching this conclusion, the Court observed that the Statute of Frauds was not designed to permit a party to escape a just obligation, saying:

> "The Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. But, as Professor Williston observed: 'The Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made' (4 Williston, *Contracts* [3d ed.] § 567A, pp. 19-20)." 23 N.Y.2d at 574; 245 N.E.2d at 715; 297 N.Y.S.2d at 952.

Moreover, the recent decision in *Flammia* v. *Mite Corp.*, 401 F. Supp. 1121 (E.D.N.Y. 1975), rejected precisely the argument advanced by defendant here. Construing the New York Statute of Frauds in that case, the District Court held that a finder was entitled to quasi-contractual recovery where there was a written memorandum between him and his principal which satisfied the requirements set forth in the *Morris Cohon* case. *See also Peters* v. *Sigma Data Computing Corp.*, 397 F. Supp. 1098 (E.D.N.Y. 1975); *Backar* v. *Western States Prod. Co.*, 382 F. Supp. 1170 (W.D. Tex. 1974) (construing New York Statute of Frauds, G.O.L. § 5-701(10)). Here, the written agreements at issue clearly meet those requirements. [JA* at 95, 99.] The only dispute is whether the oral promises to extend those agreements made by USLIFE's Chairman and Chief Executive

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* "JA" refers to the Joint Appendix to the Briefs.

Officer now estop the defendant from asserting the defense of the Statute of Frauds.

In the *Intercontinental* case, the New York Court of Appeals made it plain that its decision was limited solely to plaintiff's action on the contract. The very first sentence of the opinion in that case states clearly that "[t]his appeal is limited solely to plaintiff's cause of action in contract for recovery as a finder." 24 N.Y.2d at 376; 248 N.E.2d at 577; 300 N.Y.S.2d at 819. The plaintiff made no claim of estoppel; and the Court's opinion does not even suggest an intention to overrule long-standing New York law holding that a defendant is estopped from asserting the defense of the Statute of Frauds where a party has changed his position in reliance on oral representations modifying a written agreement. *E.g., Imperator Realty Co.* v. *Tull,* 228 N.Y. 447, 127 N.E. 263 (1920); *M. H. Metal Prods. Corp.* v. *April,* 251 N.Y. 146, 167 N.E. 201 (1929). Moreover, subsequent decisions continue to apply this well-settled rule of New York law.* *See, e.g., Neonex Int'l Ltd.* v. *Norris Grain Co.,* 338 F. Supp. 845 (S.D.N.Y. 1972) (per District Judge (now Circuit Judge) Gurfein); *Nibel Corp.* v. *Ocenofsky,* 38 App. Div. 2d 534, 326 N.Y.S.2d 922 (1st Dep't 1971); *Flax* v. *B. M. Devel. Corp.,* 35 App. Div. 2d 565, 313 N.Y.S.2d 591 (2d Dep't 1970); *Bisbing* v. *Sterling Precision Corp.,* 34 App. Div. 2d 427, 312 N.Y.S.2d 305 (3d Dep't 1970); *Brockport Devels., Inc.* v. *47 Ely Corp.,* 82 Misc. 2d 310, 369 N.Y.S.2d 601 (Sup. Ct. Monroe Co. 1975); *28 Mott St. Co.* v. *Summit Corp.,* 59 Misc. 2d 459, 299

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* Defendant's reliance on *Itek Corp.* v. *RCA Corp.,* 32 N.Y.2d 730, 297 N.E.2d 100, 344 N.Y.S.2d 365 (1973), *aff'g mem.,* 39 App. Div. 2d 679, 332 N.Y.S.2d 117 (1st Dep't 1972) is puzzling at best. That case involved solely the California Statute of Frauds; no party to the action argued that New York law should apply. Moreover, as shown in plaintiff's Main Brief, California, like New York, recognizes the doctrine of estoppel as a bar to the defense of the Statute of Frauds. [Main Br. at 9-10.]

N.Y.S.2d 763 (Civ. Ct. N.Y.C.), *rev'd on other grounds,* 62 Misc. 2d 345, 308 N.Y.S.2d 658 (App. T. 1969), *rev'd and judgment below reinstated,* 34 App. Div. 2d 144, 310 N.Y.S. 2d 93 (1st Dep't 1970), *aff'd,* 28 N.Y.2d 508, 267 N.E.2d 880, 319 N.Y.S.2d 65 (1971).

New York law is clear that the defendant may be estopped from asserting the Statute of Frauds, and plaintiffs' evidence on this issue should have been submitted to the jury.

POINT II

PLAINTIFFS' EVIDENCE ESTABLISHED A PRIMA FACIE SHOWING OF THE PROPER ELEMENTS OF ESTOPPEL

During their case-in-chief, plaintiffs presented evidence that Crosby, USLIFE's Chairman and Chief Executive Officer, made oral promises to extend the written fee agreements on four different occasions. Much of the defendant's brief is devoted to argument that these promises were never made. As it was required to do for the purpose of the motion for a directed verdict, however, the District Court assumed that plaintiffs' evidence of these promises to extend was correct [JA at 137], and this brief will not deal with defendant's contentions to the contrary. Instead, the following section of this Argument will deal briefly with the legal and factual errors committed by the District Court and show that defendant's efforts to support the decision below are without merit.

A. Proof of Scienter Is Not Required.

In its decision, the District Court ruled that plaintiffs were required to establish the elements of common law fraud, including *scienter,* in order to recover in this action. Plaintiff's Main Brief shows that no New York authority

supports the District Court's ruling, and that New York decisions have estopped a party from relying on the Statute of Frauds without any showing of *scienter*. [Main Br. at 8, 11-14.] The defendant's brief fails to distinguish the authority cited by the plaintiffs and, in fact, almost ignores the controlling decision of the New York Court of Appeals in *Imperator Realty Co.* v. *Tull, supra.*

Recent decisions continue to follow the principles laid down in the *Imperator Realty* case. For example, in *28 Mott St. Co.* v. *Summit Corp., supra,* the trial court stated that a party may be estopped from invoking the Statute of Frauds without a showing of actual fraud. The court said:

> "The requirements to invoke estoppel may be narrowed down to the existence of an actual agreement and some overreaching (*not necessarily fraud*) on the part of the party against whom the estoppel is sought to be invoked, which imposes an unfair one-sidedness to the transaction. [Citations omitted.]" 59 Misc. 2d at 462; 299 N.Y.S.2d at 767 (emphasis added).

See also Oxley v *Ralston Purina Co.*, 349 F.2d 328, 336 (6th Cir. 1965). In short, the District Court's radical holding, overruling the law of estoppel in New York, plainly conflicts with the governing authorities in this state.

B. Plaintiffs Proved Scienter.

Even assuming that the doctrine of estoppel no longer exists in New York and that only proof of fraud would merit recovery here, plaintiffs made a *prima facie* showing of fraud at trial. Specifically, plaintiffs showed that Crosby intended to defraud them when he made his promises to extend the written finder's agreements. [Main Br. at 16-22.]

Briefly, Rodney A. Hawes, Jr. ("Hawes") testified on behalf of PS&Co. that each time Crosby executed the written fee agreement he promised to extend it if he had a

continuing interest in acquiring All American when the written agreement expired. Crosby himself testified that he had a continuing interest in the acquisition when each fee agreement expired. [Trial Transcript at 297-98, 302.] In its brief, USLIFE concedes that there was "no evidence to show that [Crosby] had formed an intention one way or another on whether to extend" the written agreement when he made those promises. Under New York law, this state of mind establishes intent to defraud. [Main Br. at 15-16.] At best, defendant's argument concerning these promises raises issues of fact which only the jury was entitled to resolve.

Furthermore, the defendant's brief, like the opinion of the District Court, completely disregards the evidence showing that Crosby specifically intended to defraud Rutherford when he promised to update the second fee agreement in May 1973 in return for Rutherford's assistance in the negotiations with All American. [Main Br. at 21-22.] On this point, the defendant can only assert that Crosby's statement "cannot be classified as a promise at all." [USLIFE Br. at 25.] But the District Court held to the contrary [JA at 139-140]; and in any case that, too, was an issue for the jury to determine.

C. Plaintiffs' Acts Were Unequivocally Referable to the Oral Promises.

In its opinion, the District Court held that plaintiffs' acts of reliance were not unequivocally referable to the oral promises made by Crosby because (1) the acquisition of All American by USLIFE may have resulted in a profit to Rutherford and Hawes based on their ownership of stock in the two corporations; and (2) Crosby had voluntarily extended a written agreement covering a prior transaction and Rutherford thus considered the expiration date of this agreement to be "immaterial." As shown in plaintiffs' Main Brief, however, the District Court ruled during the trial that evidence of profit from stock transactions was irrelevant to the question whether plaintiffs' acts of reliance were unequivocally referable to the oral promises. [Main Br. at 26-27.] Because of these rulings, there is no evidence in

the record that Rutherford made or expected any profit from his stock ownership as a result of the acquisition.*

Similarly, as shown in the Main Brief, Rutherford's testimony that the expiration date was "immaterial" to him hardly justifies a directed verdict. [Main Br. at 27.] Rutherford did not testify that he was relying on Crosby's extension of the fee agreement in the prior transaction to protect him in the transaction at issue. Instead, Rutherford believed he was dealing with a man who kept his word; and he therefore relied on the promises Crosby made in this transaction.**

D. Plaintiffs Suffered Substantial Injury.

As shown in the Main Brief, each time Crosby believed that plaintiffs' assistance would be valuable in consummating an acquisition of All American, he promised to extend the written fee agreements. Because of this persistent conduct, plaintiffs refrained from taking All American to another buyer. By the time Crosby retracted his promises, after USLIFE and All American had entered into an agreement in principle, it was too late for plaintiffs to obtain another suitor.

In its brief, defendant contends that plaintiffs' claim that "they lost an opportunity to sell All American to others because of their reliance on Crosby's oral promises to extend their fee agreement is contrary to the evidence." [USLIFE Br. at 33.] To support this proposition, defendant argues that "in early 1973, Hawes and Smith threatened to sell All American to someone else unless Crosby

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* Defendant's citations to the record on this issue show only that Rutherford owned stock in All American. Nothing cited by defendant gives any hint that Rutherford expected, or even considered, that he would make any profit on this stock as a result of an acquisition.

** Contrary to defendant's assertion, the testimony of Rutherford quoted at pp. 30-31 of USLIFE's brief also shows that Rutherford was relying on Crosby to keep his 1973 promise to extend. As that testimony makes clear, Rutherford did not discuss terms for any "new" agreement with Crosby. Instead, he was led to believe that Crosby would simply extend the prior agreement as he had in 1972.

would agree to pay them a fee." [*Id.*] This statement is squarely contradicted by the plaintiffs' evidence. Thus, according to Crosby, in a personal meeting with the US-LIFE chairman in early 1973, Smith and Hawes threatened to sell All American to another buyer and Crosby responded, "Be my guest." [*Id.*] According to Hawes' testimony, however, in the only conversation he had with Crosby in early 1973 (alone on the telephone, not at a meeting including Smith), Hawes asked that the fee agreement be updated. Crosby replied, "That's a lot of money. I have to think of my stockholders first", and then promised to get back to Hawes. [Trial Transcript at 77, 80.] In other words, Crosby continued to hold out the promise of a fee, thereby persuading plaintiffs to forego any efforts to find other purchasers for All American.

In short, the testimony on which the defendant relies to show that plaintiffs did not suffer substantial injury by continuing to assist Crosby in his acquisition effort is flatly contradicted by other testimony at trial. This is a conflict which only the jury could resolve.

Conclusion

The judgment below should be reversed and this action remanded to the District Court for a new trial.

Respectfully submitted,

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